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June 20, 1994

Mr. William F. Caton
Acting Secretary,
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D. C. 20554

Via Messenger

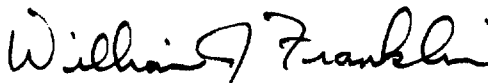
Re: **GN Docket No. 93-252**
Implementation of Sections 3(n) and 332
of the Communications Act
Regulatory Treatment of Mobile Services

Dear Mr. Caton:

Submitted herewith on behalf of PCC Management Corporation are an original plus ten (10) copies of its Comments with respect to the above-referenced docket.

Kindly contact my office directly with any questions concerning this submission.

Respectfully submitted,



William J. Franklin
Attorney for PCC Management Corp.

Encs.
cc: PCC Management Corp.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)

Implementation of Sections 3(n)
and 332 of the Communications
Act)

GN Docket No. 93-252

Regulatory Treatment of
Mobile Services)

To: The Commission

COMMENTS OF PCC MANAGEMENT CORP.

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SUMMARY OF COMMENTS

PCC Management Corp. ("PCC") is in the business of providing construction and management services to various licensees in the commercial mobile radio services, especially for 800 MHz SMR systems. PCC has an excellent perspective from which to comment on the Commission's proposed regulatory treatment of 800 MHz licensees.

I

Interconnected 800 MHz SMR service is not substantially similar to any Part 22 mobile service. Although superficially similar to cellular, ESMR service is differentiated by limited coverage, fragmented spectrum, and non-contiguous licensing. There is no Part 22 analog to traditional 800 MHz dispatch service; the Part 22 IMTS service is so primitive and obsolete that it should be disregarded for regulatory similarity purposes. However, in certain circumstances, regulatory techniques found helpful in Part 22 and elsewhere in Part 90 of the Rules should be applied to 800 MHz CMRS service.

II

Because of the regulatory economies and licensee flexibility inherent in area-based licensing, the Commission should permit 800 MHz licensees to self-designate the areas in which they intend to operate wide-area systems. This pre-designation should be subject to area take-back based on systems actually constructed within an extended implementation period.

The Commission should not convert shared 800 MHz channels to exclusive use by regulation. The Commission should permit the regional licensing of 220 MHz SMR channels.

III

The 800 MHz technical rules should remain unchanged. Within the 800 MHz band, PCC favors the long-term goal of interoperability over a five-year transition period, but not at the immediate expense of freezing development of the industry.

IV

The Commission should adopt a 12-month construction deadline for 800 MHz systems. All CMRS licensees proposing complex systems need the ability to qualify for extended implementation schedules.

V

The Commission should repeal the various 40-mile ownership prohibitions applicable to Part 90 CMRS systems. Such restrictions hinder the development of advanced communications systems and serve no valid purpose in an auction environment. The Commission should permit a single callsign to be transmitted by an integrated system, optionally in a digital format.

VI

The Commission should not increase the filing fees for private-radio CMRS licensees to match their common-carrier counterparts. This increase would not serve the public interest by hindering the development of systems by smaller businesses.

Section 8 of the Communications Act establishes the Commission's filing-fee schedule. Unlike the regulatory-fee schedule established by Section 9, the Commission has no statutory authority to amend or modify the fees established by Section 8.

VII

The Commission should adopt a reasonable, technically justifiable standard for determining when an additional proposed location is a new station, rather than a modification. For determining when an application proposes to modify a license, the Commission should compare the distance between the existing and proposed stations against the maximum service contour of the radio service in question. Stations which are operated by licensees under substantially common ownership or as part of an integrated communications system are deemed to belong to "the same licensee" for the purpose of determining when an application proposes a license modification.

The Commission should apply the "minor modification" procedures from Section 22.9 to CMRS licensees regulated under Part 90. It should also find that the CMRS transition constitutes "extraordinary circumstances" to permit the continuation of STAs granted under Part 90 to CMRS licensees.

VIII

For all existing CMRS services, the Commission should apply the transfer-of-control and assignment policies now appearing in Section 22.40(a) of the Rules. For ESMR and other wide-area

systems, the Commission should generally adopt the policies now appearing in Section 22.40(b)(1) for unserved-area cellular systems. The Commission should freely permit pro forma or involuntary transfers or assignments at any time, as well as the specific transactions listed in Section 22.922(a).

IX

In the sound exercise of discretion, the Commission generally should delay the effective date of its CMRS transition rules adopted as a result of the FNPRM until it resolves the issues raised by the Petitions for Reconsideration of its initial rules. Rules which have a time-sensitive nature, such as those affecting construction deadlines, should be immediately effective.

The CMRS rulemaking is far too complex for the Commission to get all the major issues right in one order. The Commission is changing -- dramatically changing -- the rules for an existing multi-billion dollar industry. The stakes are too high for the Commission to create problems for the industry.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Implementation of Sections 3(n)
and 332 of the Communications
Act

GN Docket No. 93-252

Regulatory Treatment of
Mobile Services

To: The Commission

COMMENTS OF PCC MANAGEMENT CORP.

PCC Management Corp. ("PCC"), by its attorney and pursuant to Section 1.415 of the Commission's Rules, hereby files comments with respect to the Commission's Further Notice of Proposed Rulemaking in the above-captioned proceeding.^{1/} PCC's comments are focused on the Commission's regulatory treatment of 800 MHz licensees, and issues ancillary thereto.

DESCRIPTION OF PCC

PCC is in the business of providing construction and management services to various licensees in the commercial mobile radio services. It now is under contract to a number of Commission licensees to provide such services for 800 MHz SMR systems. In the course of preparing and negotiating management contracts and in providing management services to its customers, PCC has developed a familiarity with the issues raised by the FNPRM which will be of assistance to the Commission.

^{1/} 9 FCC Rcd ____ (FCC 94-100, released May 20, 1994) ("FNPRM").

PCC has installed and/or operated 800 MHz SMR systems pursuant to its management contracts. Additionally, PCC's management and professional personnel have extensive experience with communications services of all types. With this extensive practical experience and knowledge of the SMR industry and 800 MHz technology, PCC has an excellent perspective from which to comment on the Commission's proposed regulatory treatment of 800 MHz licensees.

COMMENTS

I. ALTHOUGH SUPERFICIAL SIMILARITIES EXIST, 800 MHz SMR AND ESMR SERVICE IS NOT SUBSTANTIALLY SIMILAR TO ANY PART 22 SERVICE.

Paragraphs 15 and 16 of the FNPRM request comment on whether interconnected 800 MHz CMRS service is substantially similar to any Part 22 mobile service, such as cellular or IMTS mobile telephone service. Based on its knowledge of the 800 MHz technology and industry, PCC believes that 800 MHz CMRS service -- as it exists, and not as it could exist if the Commission were starting afresh with 800 MHz licensing -- has no substantial similarities to any Part 22 service.^{2/}

Paragraph 16 of the FNPRM postulates that wide-area SMR ("ESMR") might be substantially similar to cellular. This

^{2/} Part 22 mobile services include paging (in three frequency band), traditional IMTS two-way service (in two frequency bands), cellular service, air-ground service (in two frequency bands), and certain specialized services which are not relevant here. Obviously, interconnected 800 MHz CMRS service is not substantially similar to paging, air-ground service, and the specialized Part 22 services, and those services may be dismissed from consideration.

comparison has some superficial similarities, especially when the service areas and total allocated spectrum are compared. However, this comparison breaks down when the Commission considers the licensed blocks of spectrum; cellular spectrum is licensed in two monolithic chunks over geographically defined areas, while ESMR spectrum is fragmented both by frequency and by location-based service areas. Cellular has nationwide coverage with fully interoperable equipment; ESMR has service only in selected portions of the country with limited equipment variety. Even if the Commission adopts area-based licensing for ESMR service, the ESMR licensing process will be required to co-exist with the patchwork of existing SMR licensees.

To be sure, ESMR has proclaimed itself as a cellular competitor. However, this self-labelling cannot make the two services substantially similar for the purposes of Commission regulation. Just as a minivan and a semi-trailer are both trucks which could compete to deliver cargo, the capacity and functional differences between the two trucks overwhelm the similarities. In short, ESMR service has no "substantially similar" Part 22 analog.

Paragraph 16 of the FNPRM further postulates that traditional (dispatch-based, local) SMR service might be substantially similar to traditional IMTS two-way service. IMTS service, which has faded from widespread use with the development of cellular and 800 MHz SMR, offers wideband, analog, voice-only mobile telephone service from a limited number of non-interconnected

locations and channels per system.³ Other than being even more primitive (both by technology and by regulatory structure) than 800 MHz dispatch service, IMTS service is not substantially similar to SMR service.

The Commission should base its revision to 800 MHz regulation on the latest available thinking, and not the regulatory approach of the 1970's and before. The public interest is not served if the Commission finds unlike services similar so that it might adopt common regulations. However, in certain circumstances as set forth herein, regulatory techniques found helpful in Part 22 of the Rules should be applied to 800 MHz CMRS service.

II. THE COMMISSION SHOULD PERMIT REGIONAL LICENSING FOR SMR SYSTEMS; SHARED 800 MHz CHANNELS SHOULD NOT BE MADE EXCLUSIVE BY REGULATORY FIAT.

Paragraphs 26-38 of the FNPRM request comment on possible modifications to the channel-assignment policies and service-area definitions for SMR systems.

PCC strongly supports the concept (described in paragraph 33) of the FNPRM that 800 MHz licensees be permitted to designate the areas in which they intend to operate wide-area systems. This pre-designation should be subject to area take-back based on systems actually constructed within an extended implementation

^{3/} The IMTS service has a total of 18 VHF and 26 UHF channels, most of which are being used for paging. In fact, IMTS service is of such limited utility for most of the country and so technically obsolete that the Commission might well consider it substantially similar to nothing.

period. This procedure will result in a more complete utilization of spectrum in a shorter period of time.

Because of the patchwork nature of existing 800 MHz licensing, it will be impossible in virtually every area of the county for the Commission to license pre-defined wide-area 800 MHz systems. Thus, self-designation of wide-area systems will prove the only practical method for such licensing. Even with self-designation, the Commission and the SMR industry must recognize that licensees likely will not have the right to use all their licensed channels at every location within their licensed wide area; preexisting licenses held by third parties (or even by other wide-area systems) will require that the wide-area systems hold non-contiguous frequency-usage rights.

PCC also supports the Commission's analysis (paragraph 35 of the FNPRM) that the pattern of channel sharing at 800 MHz prevents near-insurmountable problems in converting those channels to exclusive use by regulation.^{4/} The exclusive channels provided by Part 22 for IMTS usage are not substantially similar to the shared channels made available at 800 MHz.

Finally, PCC supports the Commission's proposal (paragraph 38 of the FNPRM) to permit the regional licensing of 220 MHz SMR channels. Conversion of existing 220 MHz licenses to PCS-like area-based authorizations can readily be done after the expiration of the construction deadline for initial 220 MHz local

^{4/} The Commission's existing procedures for the Commission-approved private conversion of shared channels to exclusive use should be retained.

licenses and purging from the Commission's database of unconstructed systems, and before the acceptance of an additional set of initial applications. At that time, licensees of constructed 220 MHz systems could request BTA-wide, MTA-wide, regional, or nationwide authorizations, using much the same procedures that the Commission applied in converting 900 MHz Private Carrier Paging systems to exclusive licenses or will adopt for the licensing of regional ESMR systems. Multiple licensees requesting the same frequency and area each would be given the option to change to an available frequency or accept co-primary grandfathered status within their authorized area.

III. THE COMMISSION SHOULD MAKE ONLY MINOR CHANGES TO THE 800 MHz TECHNICAL RULES.

Paragraphs 39-57 of the FNPRM request comment on potential changes to various technical rules for 800 MHz CMRS operations. PCC generally supports those proposals, which should be band-specific rather than service-specific. With one exception, the 800 MHz technical rules should remain unchanged.^{5/}

Paragraph 41 of the FNPRM requests comment on changes to interference criteria if ESMR systems become subject to area-based licensing. PCC supports the Commission's concept of regulating interference only at the licensed boundary of a wide-

^{5/} PCC specifically requests that the Commission retain the existing SMR height and power limits. For the reasons specified in paragraph 49 of the FNPRM, SMR systems require their existing power limits for effective and economical operation.

area service, but only if the licensee has exclusive use of its channels throughout its licensed area.^{6/}

In Paragraphs 56 and 57, the Commission requests comments on interoperability, either between services or within services. PCC opposes any interoperability between services. By design, different services have different functions and capabilities. This serves the public interest by providing diversity in communications services and equipment. Inter-service interoperability could well raise equipment costs substantially and reduce service and equipment offerings to the lowest common denominator.

Within bands, however, PCC favors the long-term goal of interoperability, but not at the immediate expense of freezing development of the industry. As the cellular experience shows (as compared with the 800 MHz SMR), intra-service equipment interoperability services the public interest by permitting manufacturing economies of scale and the widest range of service availability.

PCC would favor the Commission establishing a long-term (say, 5-year) deadline after which the Commission would not type-accept non-interoperable 800 MHz equipment. Five years is sufficient time for currently installed 800 MHz equipment to be used and written off. Similarly, five years will allow the industry sufficient time to adopt a common air interface, develop

^{6/} See FNPRM, ¶41 n.66. The likelihood for non-contiguous ESMR licenses is noted above in Part II, supra page 5.

advanced radio equipment, and begin its commercial roll-out thereof.

IV. THE COMMISSION SHOULD USE A 12-MONTH CONSTRUCTION DEADLINE FOR SIMPLE CMRS SYSTEMS; COMPLEX SYSTEMS SHOULD RECEIVE EXTENDED CONSTRUCTION DEADLINES.

Paragraphs 59-66 of the FNPRM request comment on the proper construction periods and coverage requirements for CMRS systems. For 800 MHz systems, the Commission should extend the CMRS construction period from 8 to 12 months.

In PCC's experience, licensees proposing complex systems need the ability to qualify for extended implementation schedules. Currently, the Commission permits extended implementation schedules for nationwide 220 MHz systems,^{7/} integrated 800 MHz and 900 MHz SMR systems,^{8/} multi-transmitter paging systems,^{9/} ESMR Systems,^{10/} cellular systems,^{11/} 800 MHz air-ground systems,^{12/} and all PCS systems.^{13/} The Commission did this in each case because it recognized that complex, technically advanced, multi-site communications systems require careful design

^{7/} Section 90.725(f) of the Rules.

^{8/} Section 90.629 of the Commission's Rules.

^{9/} Section 90.496 of the Commission's Rules.

^{10/} See, e.g., Fleet Call, Inc., 6 FCC Rcd 1533 (1991), and subsequent ESMR decisions.

^{11/} Pursuant to Section 22.43(c) of the Commission's Rules, initial (i.e., non-unserved-area) cellular systems have three years to complete construction.

^{12/} Section 22.43(e) of the Commission's Rules.

^{13/} Section 99.206 of the Commission's Rules.

and extensive construction efforts before they are completed.^{14/} Those policies should continue to apply to all complex CMRS systems.

Moreover, extended implementation schedules should be permitted when groups of licensees unify to create a complex communication system. The existing SMR industry (at 800 MHz, 900 MHz, and 220 MHz) commonly creates networks of separately owned but commonly managed systems. This practice leads to spectrum economies and advanced service to the public. Extended implementation should be available to commonly managed or commonly owned systems involving the construction of a substantial number of channels, say 100 or more.

V. THE COMMISSION SHOULD REPEAL THE 40-MILE RULE, AND ADOPT OTHER PROPOSED CHANGES TO THE SMR OPERATIONAL RULES.

Paragraphs 58-85 of the FNPRM propose a series of operational rule changes for CMRS. In addition to the changes to the construction deadlines discussed above,^{15/} other operational changes should be adopted. For example, the proposal of paragraph 82 of the FNPRM to permit a single callsign to be transmitted by an integrated system, optionally in a digital format, should be adopted. This permission should extend to networked, commonly operated, individually licensed systems.

PCC specifically supports elimination of the 40-mile rule for all SMR systems in all frequency bands. This rule served a

^{14/} See generally, FNPRM, ¶¶60, 64-66.

^{15/} See Comments, Part IV, supra pages 8-9.

valuable regulatory purpose during the initial licensing of SMR systems, by preventing applicants from skewing the Commission's 220 MHz and 900 MHz lottery procedures or by warehousing 800 MHz channels. However, those purposes have substantially evaporated now that the initial 220 MHz and 900 MHz licenses have been granted. Further, as the Commission likely moves to auctions for additional new SMR licenses, the 40-mile rule serves no useful purpose at all.

The Commission should repeal the 40-mile rule, and allow applicants to acquire SMR licenses by auction or assignment as their finances and business judgment dictate. This would bring the Commission's SMR regulations into line with Part 22 CMRS practice, which imposes no limits on licensed channel capacity (although new paging applications are subject to a one-at-a-time rule).

VI. THE COMMISSION SHOULD NOT RAISE THE FILING FEES FOR PRIVATE-RADIO CMRS SERVICES; IN ANY EVENT, IT LACKS THE STATUTORY AUTHORITY TO DO SO.

In paragraph 115 of the FNPRM, the Commission proposes to increase the filing fees for private-radio CMRS licensees to match their common-carrier counterparts. The Commission should not do so.

Currently, an SMR applicant pays a filing fee of \$35 per callsign (FCC Form 574), which typically would be a five-channel system. The Commission proposes to apply the common-carrier fee schedule to such applications, which would increase the fee to \$230 per channel, or \$1150 for a five-channel system. In other

words, the SMR filing fees would increase by nearly thirty-three (33) times, a fantastic increase! For many small SMR applicants, this new filing fee would be virtually prohibitive and hinder their ability to develop or modify systems.

Section 8 of the Communications Act establishes the Commission's schedule of filing fees, subject to adjustment only to reflect increases in the cost of living. The Commission lacks authority under the Communication Act to amend that schedule in any other fashion. Although SMR licensees will be CMRS service providers, they still be will licensed under Part 90 in the Private Radio Services. Thus, Section 8 requires that the Commission maintain its existing fee schedule for Part 90 licensees.

The FNPRM incorrectly relies on Section 6002(d)(3) of the Omnibus Budget Reconciliation Act of 1993 (the "Budget Act") as justifying this fee increase. However, that Section requires only that the Commission assure that licensees in substantially similar services are subject to "technical requirements that are comparable...." The word "technical" limits this comparability to the technical, operational, procedural rules which are properly the subject of the FNPRM, and not to the financial requirements which flow from Section 8 of the Communications Act.

The legislative history of the Budget Act confirms this limited interpretation of the word "technical." In the House bill which led to amendments to the Communications Act in Budget Act, the purpose of that Section was described as "provid[ing]

for an orderly transition of these [private] services to regulation as common carriers."^{16/} The corresponding Senate bill was described as "provid[ing] for a transition to the treatment of these [private] services as common carrier services."^{17/} But the Conference Report describes the Budget Act as:

[E]nsur[ing] that services which were formerly private land mobile radio services and become common carrier services as a result of this Act are subjected to technical requirements that are comparable to the technical requirements that apply to similar common carrier services.^{18/}

Congress' repeated use of the phrase "technical requirements", rather than the broader terms "regulation" (House) or "treatment" (Senate) clearly indicates that the phrase "technical requirements" should be read narrowly.^{19/}

Further, had Congress intended that the Private-Radio filing fees increase exponentially as the Commission proposes, it would have amended Section 8 itself. Congress' silence on the issue confirms its intention to leave the filing fees unchanged.

Finally, Congress' silence on changes to the filing-fee structure under Section 8 should be contrasted with its explicit grant of authority to the Commission to amend the regulatory fees

^{16/} Conference Report on H.R. 2264, Omnibus Budget reconciliation Act of 1993, 139 Cong. Rec. H5792, H5918 (103d Cong. 1st Sess.) (August 4, 1993).

^{17/} Id.

^{18/} Id. (emphasis added).

^{19/} Indeed, the FNPRM (at ¶20 n.36) appears to recognize this conclusion by necessity of its explicit finding that "operational rules" are contained within the meaning of "technical". If the Commission felt that its authority to equalize rules were broad, that finding would have been unnecessary.

imposed by Section 9 of the Act. Specifically, Section 9(b)(3) of the Act gives the Commission the "express authority to 'add, delete, or reclassify' services in the [regulatory] fee schedule."^{20/} Congress made no parallel grant of authority to the Commission with respect to the filing fees.

Thus, the Commission has no obligation and no statutory authority to increase private-radio filing fees. It must withdraw the proposal made in paragraph 115 of the FNPRM.

VII. THE COMMISSION NEEDS TO RESHAPE ITS DEFINITIONS OF "MAJOR MODIFICATION", "MODIFICATION TO LICENSE", AND "MINOR MODIFICATION" TO CORRESPOND WITH CURRENT INDUSTRY AND COMMISSION PRACTICES.

Paragraphs 129-134 of the FNPRM request comment on the proper procedures for amending of CMRS applications and the modification of CMRS licenses. The Commission should adopt a reasonable, technically justifiable standard for determining when an additional proposed location is a new station, rather than a modification.

Paragraph 134 of the FNPRM requests comment on the extent to which the Part 22 "minor modification" procedures (in Section 22.9 of the Rules) should apply to Part-90 CMRS licensees. Those procedures were developed and refined in the Part 22 Rewrite Proceeding in the 1980's (Docket No. 80-57),^{21/} and are subject

^{20/} FNPRM, ¶116 n.189, quoting Section 9(b)(3) of the Communications Act.

^{21/} See Revision and Update of Part 22, 95 FCC 2d 769 (1993) (¶¶21-22).

to further refinements in the current Part 22 Rewrite Notice.^{22/} The procedures work: they reduce the workload on the Commission staff, provide flexibility and economy for licensees, and fully protect the public interest. The Commission should apply these procedures to all CMRS licensees, such that any change which does not create increased interference to others and does not substantially change the terms of the license may be accomplished on a notification-only basis.

Paragraph 131 of the FNPRM proposes to adopt the definition of "major modification" amendments which the Commission initially proposed for common-carrier 931 MHz paging applications, i.e., an amendment is a major modification to an existing application only if (a) it is for the same frequency as currently proposed, and (b) if it involves a relocation, it proposes a new site 2 kilometers (or 1.6 miles)^{23/} or less from the currently proposed site.^{24/}

Paragraph 132 of the FNPRM proposes to apply this definition of "major modification" to determine when an application is a modification to an existing station, i.e., is not subject to the Commission's auction authority. In this context, PCC notes that

^{22/} Rewrite of Part 22, 7 FCC Rcd 3658, 3660-61 (1992) (Notice of Proposed Rule Making) ("Part 22 Rewrite Notice").

^{23/} As a threshold matter, the Commission's kilometer-to-mile conversion is incorrect: 2 kilometers is 1.24 miles; 1.6 miles is roughly 2.6 kilometers. Thus, the Commission's proposal is internally inconsistent and requires clarification.

^{24/} FNPRM, ¶131, citing Part 22 Rewrite, 9 FCC Rcd ____ (FCC 94-102, released May 20, 1994) (¶18) (Further Notice of Proposed Rulemaking) ("Part 22 Further Notice").

the Commission failed to restate in the FNPRM the criteria proposed in the Part 22 Further Notice (at ¶18) to determine a modification application, i.e., an application is a modification to an existing station only if (a) it proposes new locations 2 kilometers (or 1.6 miles) or less from a previously authorized and fully operational base station licensed to the same licensee on the same frequency, (b) it to relocate an authorized site to a new location 2 kilometers (or 1.6 miles) or less from the current site, or (c) the application seeks a technical change that would not increase the service contour.

PCC supports the Commission's proposal to use the same criteria, subject to specific exceptions noted below, to determine major amendments and modifications to licensees. However, in several important respects, the specific proposals advanced by the Commission are far too rigid and do not serve the public interest.

First, the Commission's proposal is substantially irrelevant for area-licensed services, such as cellular, narrowband and broadband PCS, regional and national paging, and nationwide 220 MHz CMRS. If the Commission decides to use area licensing for 800 MHz CMRS, then such criteria would apply there as well. The Commission needs to propose a different set of criteria for such services.

Second, the Commission's use of a 2-kilometer radius (or the 1.6 mile/2.6 kilometer radius) to determine when an application is a license modification is far too small. This will work a

hardship on licensees, especially on smaller businesses who do not have the resources to develop new tower sites merely to maintain the 2- (or 2.6-) kilometer spacing. For each service, the Commission should use a distance roughly twice the expected reliable service contour for base station licensed at maximum height and power as the maximum distance under which a new application is deemed to be modifying an existing license.^{25/}

This situation is one in which major-amendment and license-modification criteria should differ. For amendments, the Commission should keep the maximum relocation distance at 2 (or 2.6) kilometers, so that applicants cannot move their proposed sites without reappearing on public notice. However, modification applications will always appear on public notice, so this concern is irrelevant. Here, and in accord with existing Part 22 practice, the Commission's concern should be that the existing and proposed sites can be operated as an integrated system. This concern is met when the predicted, reliable service contours for the existing and proposed sites can touch.

Third, for two-way stations (800 MHz, 900 MHz, and 220 MHz SMR, as well as IMTS), the Commission's "same frequency" criteria lacks a valid technical justification. The Commission's proposal (from the Part 22 Further Notice) was developed in the context of 931 MHz paging, in which all transmitters comprising a single

^{25/} For 800 MHz CMRS licensees, this distance would be 64 kilometers (40 miles). The Commission has determined that the 800 MHz service contour is 32 kilometers (20 miles). See 800 MHz Short Spacing, 8 FCC Rcd 7293, 7294 (1993).

system use the same frequency, with simulcasting. But for two-way systems, the criteria needs to be relaxed to say "a frequency in the same frequency band which can be used for the same purposes."

Fourth, the Commission's "same licensee" criteria in determining when applications are proposing modifications to authorizations (rather than a new station) is too rigid. Currently, the Commission's Part 22 practice is to deem commonly owned stations (even if licensed to different entities) as the "same licensee" for the purpose of measuring composite service contours. The Commission carry this notion forward, such that stations which are operated by licensees under substantially common ownership or as part of an integrated communications system are deemed to belong to "the same licensee" for the purpose of determining when an application proposes a license modification.

Fifth, existing Section 22.23 (g) contains several important exceptions to the general rules on when an amendment is a major modification. While all these should be carried forward, the following are the most important:

- 22.23(g)(2): When "[t]he amendment resolves frequency conflicts with other pending applications but does not create new or increased frequency conflicts."
- 22.23(g)(3): When "[t]he amendment reflects only a change in ownership and control found by the Commission to be in the public interest...", i.e., as a result of granted transfer or assignment application to an existing authorization.
- 22.23(g)(4): When "[t]he amendment reflects only a change in ownership or control which results from [a settlement] agreement under §22.29 whereby two or more applicants ... join in one or more of the existing applications and request dismissal of their other application(s)...."

- 22.23(g)(6): When "[t]he amendment does not create new or increased frequency conflicts, and is demonstrably necessitated by events which the applicant could not have foreseen at the time of filing, such as, for example ... the loss of transmitter or receiver site...."

Subsections 22.23(g)(2) and 22.23(g)(4) are required be carried forward into CMRS regulation by Section 309(j)(6)(E) of the Communications Act, which imposes on the Commission the continuing:

[O]bligation in the public interest to continue to use engineering solutions, negotiation, ... and other means in order to avoid mutual exclusivity in application and licensing proceedings....

Thus, the Commission carry each of those exceptions forward for all CMRS applications.

Sixth, the Commission should continue to apply the existing practice with respect to Part 22 applications which permits two applicants to consent to accept harmful electrical interference which otherwise would render their applications mutually exclusive. This practice is also required by Section 309(j)(6)(E) of the Communications Act. A similar practice exists with respect to Part-90 800 MHz applicants and licensees, for whom the Commission will accept short-spacing by consent.

Finally, Paragraphs 135-138 of the FNPRM request comment on the standards to be applied when granting Special Temporary Authority (STA) to Part-90 CMRS licensees. As the Commission explains, its discretion is somewhat limited by the Communications Act with respect to CMRS applicants and licensees.

However, as a transition matter, the Commission should continue to extend existing Part 90 STAs, even for licensees